

March 17, 2015

Senator Kwame Raoul, Chair  
Senate Judiciary Committee  
400 Capital St  
Springfield, IL 62706

**RE: SB 1376, Uniform Fiduciary Access to Digital Assets (UFADA)**

Dear Chairman Raoul and members of the committee:

While well intentioned, we respectfully request that you do not move forward SB 1376 or, in the alternative, amend it so that it reflects alternative legislation that will work better for Illinois residents and the businesses serving them.

Families and estate managers of the deceased face a variety of company policies and conflicting state and federal laws when attempting to access the deceased's online accounts. And the growing use of social media provides even more challenges and opportunities for grieving families. However, the approach taken in SB 1376 could cause more harm than good by creating a rule that would make a decedent's private communications, public, *by default*. Such a rule conflicts with federal law, fails to account for the unique nature of digital stored content, and creates acute privacy concerns for decedents as well as the third parties with whom the decedent communicated.

It is for these reasons that our associations as well as privacy advocates such as the ACLU, Center for Democracy and Technology, and Electronic Frontier Foundation, oppose the approach of SB 1376.

By granting fiduciaries unfettered access to private online accounts and confidential communications SB1376 allows fiduciaries to read private and/or confidential communications, such as spousal disagreements or a deceased doctor's communications with their patients. The bill also revokes privacy choices explicitly made by the deceased, such as their wish to have all of their digital accounts deleted upon death, or to have the online service deliver email only to a designated alternate upon death.

The bill therefore fails to address key questions about how to manage and legislate in the area of access to the digital legacy of deceased Americans. For example:

- Under what circumstances can the state authorize an executor to override privacy and deletion choices made by the user?
- When must estate representatives obtain probate court orders to force online services to retain or divulge documents and communications?
- When states empower a representative to take control of an account, will that cause online services to violate their obligation to prevent unauthorized access?

Questions like these have led online service providers and social networks to offer innovative features and choices to users. For example, Facebook's "Memorialize" feature respects user's privacy wishes while also letting their friends and family post messages and memories. Facebook and other services allow users to designate a next of kin.

Unfortunately, SB 1376 will require online service providers to reconcile a new state disclosure mandate against existing federal privacy protections, as well as call into question the enforceability of these tools. The federal Electronic Communications Privacy Act (ECPA) prevents online services from sharing the contents of communications unless they first obtain consent from the subscriber or sender. But the disclosure by default rule of SB 1376 will create an inevitable conflict between state and federal law. Worse, bills such as SB 1376 would empower an estate attorney to disregard the privacy wishes of the departed expressed through these tools, which would impact the interests of all Illinois residents using any form of Internet communications or document storage.

These reasons are why no other state has passed UFADA this year. In fact, five states have already considered and rejected the UFADA approach this year (Maryland, Mississippi, North Dakota, Virginia, and Wyoming).

Instead of heading down this path, Illinois should allow its citizens to choose their afterlife privacy while allowing the fiduciary to wrap-up the estate and complying with federal law. To that end, we advocate replacing SB 1376 with the Privacy Expectation Afterlife and Choices Act (PEAC) Act<sup>1</sup> -- a bill recently passed unanimously by the Virginia legislature.

Under the PEAC Act:

- The privacy expectations, express statements of wills, and settings of users remain when the user dies. Unauthorized fiduciaries may not read private communications – privacy choices in life continue after death.
- Fiduciaries can see the banks, stock managers, and accountants with whom the deceased corresponded. This lets fiduciaries identify important interactions, like those with a bank or online broker, and then contact those institutions as part of closing the account.
- Fiduciaries can see the contents of communications only when the deceased expressly allowed it in their will or some mechanism indicating the user’s choice. If the deceased allowed disclosure of these communications, then service providers must comply, subject to verification and indemnification processes.

It’s not just our view that SB 1376 is the wrong approach. It’s also what your constituents believe. The national polling firm Zogby Analytics surveyed adults across age, demographics, and political spectrums on this issue. Zogby’s poll found:<sup>2</sup>

- **By nearly 5-to-1, Americans oppose the approach of SB 1376.** Over 70% of Americans say their private online communications and photos should remain private after they die, unless they gave prior consent for others to access. Only 15% say that estate attorneys should control their private communications and photos, even if they gave no prior consent for sharing.
- **65% of Americans say it’s against their privacy if communications and photos are shared without their consent** (as they would be under SB 1376).
- **Just 15% said an estate attorney should make the decision about sharing their private communications and photos.** 43% say these items should be deleted upon proof of death. 30% say their estate could access these items only if they gave prior consent.

Key results of this polling are attached to our testimony.

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<sup>1</sup> Available at [NetChoice.org/PEAC](http://NetChoice.org/PEAC)

<sup>2</sup> Available at [NetChoice.org/Afterlife](http://NetChoice.org/Afterlife)

For all these reasons, we urge that that you not move SB 1376 so that we can help you explore alternative legislation that will work better for Illinois citizens and the businesses serving them.

Thank you for considering our views. Please let us know if we can provide further information.

Sincerely,



Steve DelBianco  
Executive Director  
NetChoice

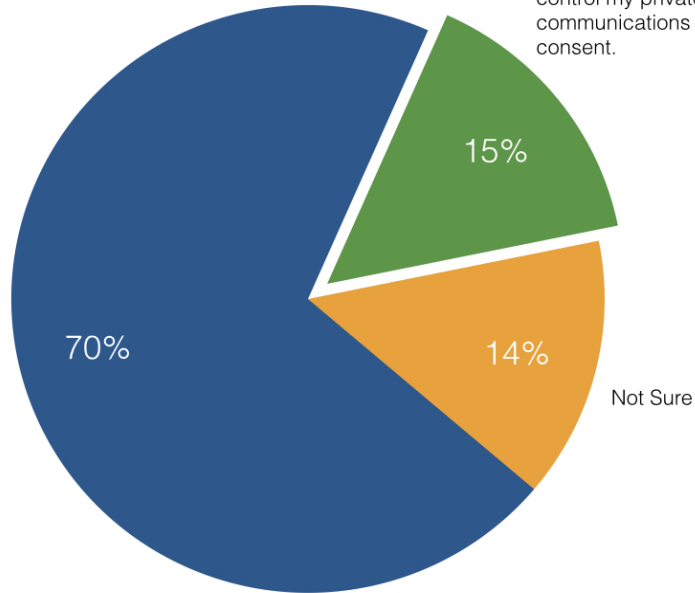


Alexi Madon  
Director, State Government Affairs  
TechAmerica

**After a person dies which of the following describes your view when it comes to keeping the emails and instant messages along with digital photos they have sent privately?**

No one should access content after I die, unless I gave prior consent.

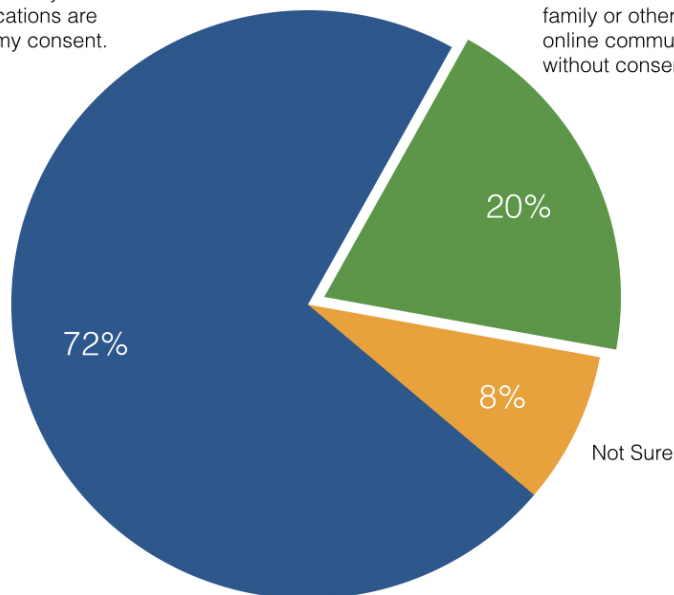
Estate executors should control my private communications even if no consent.



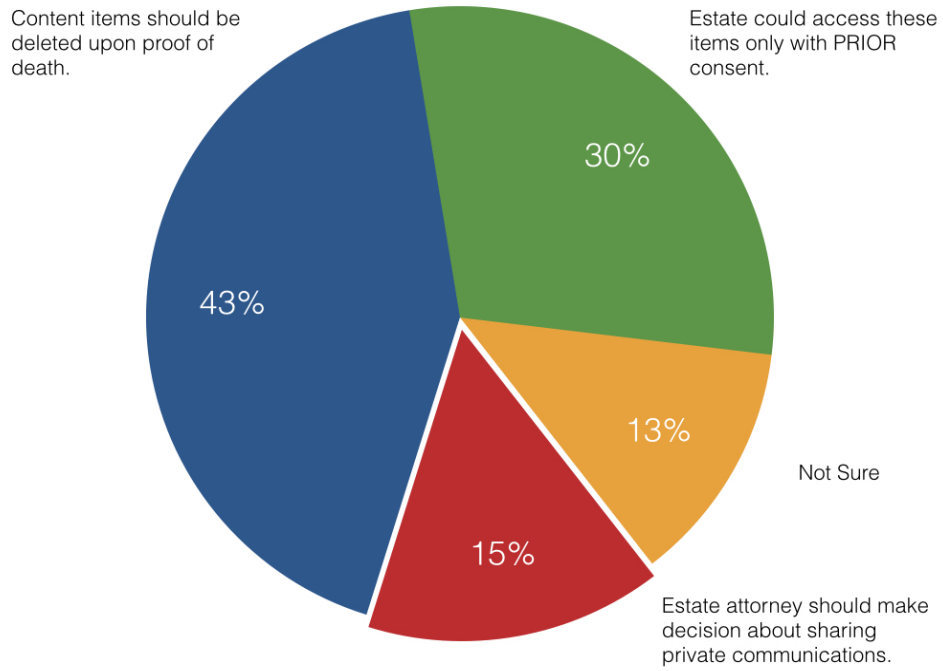
**Which of the following describes your view when it comes to keeping electronic communications and photos private, so they could not be shared without your consent?**

It's against my privacy if those communications are shared without my consent.

I don't care if my friends, family or others see my online communication without consent



**How do you want an online service to handle your private accounts when you die?**



**In your opinion, what should be the priority on privacy of online communications when someone dies?**

